SUPREME COURT, U.S.

No. 71 - 461

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

JOHN A. MENDELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions, Statutes and Rules Involved 2

Statement of the Case 3

Reasons for Granting the Writ 5

1. Venue of the crime was not properly proven, except by the judicial notice theory of the court 5

2. There was insufficient evidence to prove possession by defendant of narcotics 7

3. It was improper for the trial court to consider hearsay testimony in determining the issue 9

Conclusion 11

Appendix:

A Opinion of the Court of Appeals for the Seventh Circuit on June 29, 1971 .....App. 1

B Order denying Petition for Rehearing .....App. 8

AUTHORITIES CITED

Cases

Abrams v. United States, 250 U.S. 616 at 619 7

Bostic v. United States, No. 5250 O.T. 1970 11

Cass v. United States, 361 F.2d 409 (9 Cir. 1966) 10

Jenkins v. United States, 392 F.2d 303 (1968) 6

PAGE

Jensen v. United States, 403 F.2d 1018, 1019 (1968) 8

Montoya v. United States, 402 F.2d 847, 850 (1968) 8

Ong Way Jong v. United States, 245 F.2d 392 (9 Cir. 1957) 8, 10

Panci v. United States, 256 F.2d 308 (5 Cir. 1968) 8

Travis v. United States, 364 U.S. 631 (1961) 6

United States v. Browne, 225 F.2d 751, 755 (7 Cir. 1955) 6

United States v. Gross, 276 F. 2d 816, 818 (2 Cir. 1960) 6

United States v. Jones, 174 F.2d 746 (7 Cir. 1949) 5

United States v. Johnson, 323 U.S. 273, 276 (1944) 6

United States v. Landry, 257 F.2d 425 at 432 (7 Cir. 1958) 9

United States v. Pearce, 275 F.2d 318, 321 (7 Cir. 1960) 6

United States v. Washington, 253 F.2d 913 (1958) 7

Washington v. United States, 357 U.S. 348 (1958) 7

Other Authorities

Sixth Amendment to the Constitution, Article 3, Sec. 2, Clause 3 5

Rule 18 of the Rules of Criminal Procedure 5

21 U.S.C. 174 9

In the Supreme Court of the United States

OCTOBER TERM, 1971

NO.

JOHN A. MENDELL,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, John A. Mendell, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on June 29, 1971.

Opinions Below

The judgment of conviction and sentence of the United States District Court for the Northern District of Illinois is not officially reported. The Opinion of the Court of Appeals for the Seventh Circuit on June 29, 1971, has not yet been officially reported, but is attached hereto as Appendix "A" to this Petition.

Jurisdiction

The judgment of the Court of Appeals affirming the judgment of conviction and sentence of the district court was entered on June 29, 1971. A Petition for Rehearing was timely filed and denied on August 30, 1971. The jurisdiction of this court is invoked under and pursuant to 28 U.S. Code 1254 (1).

Questions Presented

1. Does the Sixth Amendment requirement that venue be laid in the district where the offense allegedly occurred also apply to requiring proof that venue occurred within that district?

2. Where no proof was offered that the act complained of occurred in any particular city, county or state, may the concept of "judicial notice" intervene so that the place of occurrence may be inferred when merely the names of streets are mentioned without identifying the city within which the streets are located?

3. May hearsay testimony be exclusively used to convict a defendant of possession of narcotics where the alleged statements made were outside his presence and nowhere adopted by him, especially where such hearsay statements testified to by a government agent constituted the entirety of the case against defendant?

Constitutional Provisions, Statutes and Rules Involved

Article 3, Sec. 2, Clause 3 provides: "The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed . . ."

The Sixth Amendment to the Constitution provides, in pertinent part, that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .".

Rule 18 of the Federal Rules of Criminal Procedure, Title 18 U. S. Code provides: "Except as otherwise permitted by statute or by these rules, the protection shall be had in a district in which the offense was committed."

STATEMENT OF THE CASE

Defendant was indicted on six counts charging possession and sale of heroin on 3 separate dates. Counts 5 and 6 were dismissed by the Government in the opening of the trial. Defendant was acquitted on sale Counts 1 and 3, and on one of the possession counts, Count 4, by the trial judge sitting without a jury. He was convicted of Count 2 charging that he and one, Robert French, unlawfully received 15.301 grams of imported heroin in violation of 21 U.S.C., Sec. 174. Defendant was sentenced to 5 years on this count.

At the conclusion of the government's case, defendant moved for judgment of acquittal on the grounds that venue was not proven and that there was no evidence defendant possessed narcotics. The government moved to reopen its case; but the court denied that motion.

There was testimony from a government agent that he met one, Robert French,[1] on August 7, 1968, at 4015 West

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[1] French was a co-indictee who had previously pled guilty to six counts of the indictment and received 5 year concurrent sentences on each count. He did not testify in the trial.

North Avenue. There were further meetings with government agent Gallagher and French at Pulaski and North Avenue (A. 5),[2] Pulaski and LeMoyne (A. 6), LeMoyne and Keystone, Grand and Division, and Central Park and North Avenues. At no time during any of the government's testimony by any of the five agents was any city mentioned where the transaction took place. Nor was there any testimony in which county, district or state the transaction was alleged to have taken place.

In denying defendant's motion for acquittal, the trial court stated that it would not reverse the holding in *United States* v. *Jones*, 174 F.2d 746 (7 Cir. 1949). (A. 27). The Court held that when there are a multitude of street names and intersections mentioned that "... it is a little ridiculous to say that the streets identified here don't establish the venue, don't prove the venue for propositions of establishing the court's jurisdiction and venue." (A. 27).

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[2] "A" refers to the printed Appendix as filed in the Court of Appeals.

REASONS FOR GRANTING THE WRIT

1.

Venue of the crime was not properly proven, except by the judicial notice theory of the court.

It was admitted at trial and upon appeal that no reference was made by any government witness to the city, county, district or state in which the transaction was alleged to have occurred. The Court of Appeals found with the trial court that the number of street names mentioned were sufficient for the trial court to take judicial notice that the place of occurrence was Chicago, Illinois. But such holding is in violation of Article 3, Sec. 2, Clause 3 of the Sixth Amendment to the Constitution and of Rule 18 of the Rules of Criminal Procedure.

Uniquely, the Court of Appeals chose not to overrule its own previous decision in *United States* v. *Jones,* 174 F.2d 746 (7 Cir. 1949). That case held, p. 749:

> "The evidence in this case refers to several streets where the transactions took place between the defendant and the Government agents, but not one of them is identified as being in the city of Chicago. If they had been so identified we would judicially know that Chicago is within the Northern District of Illinois. Chicago is mentioned five times in the record but not once in relation to the crime alleged.
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> • • •
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> "Venue will not be inferred from proof that the acts constituting the crime were committed upon certain streets, where the city within which the streets are located is not identified. The court will not take judicial notice that the streets referred to in evidence are in any certain town."

Jones was re-affirmed by the Seventh Circuit in *United States* v. *Browne,* 225 F.2d 751, 755 (7 Cir. 1955), and again in *United States* v. *Pearce,* 275 F.2d 318, 321 (7 Cir. 1960).

This court has stated that "questions of venue in criminal cases . . . are not merely matters of formal legal procedure, they raise deep issues of public policy . . .". *United States* v. *Johnson,* 323 U.S. 273, 276 (1944).

This court's concern for properly proving venue in the place where the trial is held was again delineated in *Travis* v. *United States,* 364 U.S. 631 (1961), wherein the place of filing a certain affidavit was held to be in the place where the affidavit was received and not in the district where the affidavit was initially mailed. In essence, *Travis* held proof of venue was not made in trial in accordance with the allegations of the indictment.

Jones, supra, was cited in *United States* v. *Gross,* 276 F. 2d 816, 818 (2 Cir. 1960): "As said by Judge Minton, as he then was, in *United States* v. *Jones* . . . 'one of the things the Government has the burden of proving is venue. It is an essential part of the Government's case. Without it there can be no conviction. U.S. Const. Amend. VI . . .' "

The Seventh Circuit's decision in this case is in conflict with the Tenth Circuit's decision in *Jenkins* v. *United States,* 392 F.2d 303 (1968). Although *Jenkins* did not involve judicial notice of streets, it did involve failure of proof of venue with respect a charge of stolen property in Oklahoma, knowing it to have been stolen in Kansas. Defendant was found with the goods in Oklahoma, but the offense of receiving was laid in Kansas, and no evidence was adduced to show that defendant was ever in the State of Kansas. The trial judge held that there was sufficient circumstantial evidence to support the venue in Kansas, but the Tenth Circuit disagreed.

We know of no case in this court wherein the precise question of judicial notice with respect to the city, locations of street names has been decided. Certiorari should be granted to resolve the conflict between the circuits, and to decide the extent to which persons may be convicted without testimonial proof on judicially noticed facts of a questionable nature.

2.

There was insufficient evidence to prove possession by defendant of narcotics.

The totality of evidence against defendant here that he possessed narcotics is on a par with *Washington* v. *United States,* 357 U.S. 348 (1958), wherein this court reversed the judgment of the United States Court of Appeals for the Seventh Circuit because of the insufficiency of the evidence. The facts in *Washington* are contained in the Court of Appeal's decision which was reversed, *United States* v. *Washington,* 253 F.2d 913 (1958). Judge Duffy's dissenting opinion in *Washington,* adopted by this court in reversal, referred to *Abrams* v. *United States,* 250 U.S. 616 at 619 for the proposition that a question of law was presented whether there was competent or substantial evidence in the record to sustain the criminal conviction. Washington's conviction for narcotics violation was, accordingly, reversed.

In the case at bar, the government's testimony was to the effect that French handed the heroin to Gallagher. The defendant was not present. But on the basis of agent Gallagher's testimony that French told him during a discussion between French and Gallagher about price that French said "the people" were waiting and that then French was seen a short time later talking with the defendant, that such was sufficient evidence that defendant

possessed the narcotics. To be remembered, is that the trial court found defendant not guilty of selling the narcotics, but felt that there was "enough suspicion" to justify the conviction. But the Court of Appeals' holding is in direct conflict with the Fifth Circuit in *Montoya* v. *United States*, 402 F.2d 847, 850 (1968): "There is ample cause for suspicion and conjecture in this case, but suspicion and conjecture are not sufficient to sustain a conviction"; in conflict with the Ninth Circuit in *Jensen* v. *United States*, 403 F.2d 1018, 1019 (1968): "On each occasion there was proof from the government agent that shortly defendant Smith delivered the heroin to a government informer, he had contacted a person using a gray Hillman auto . . . in our opinion Jensen may very well have been involved in these transactions, but there was no competent evidence to prove that any one other than Smith [and here read French] had ever had possession, either actual or constructive, of the heroin sold and concealed on February 28, 1967, and March 8, 1967 . . . without any proof of possession in Jensen, the government cannot rely on the presumption Jensen knew the heroin purchased from Smith was imported or brought into the United States contrary to law—an essential element of 21 U.S.C. Sec. 174 . . .".

To the same effect, *Panci* v. *United States*, 256 F.2d 308 (5 Cir. 1968) reversed a narcotics conviction under facts somewhat similar to the case at bar.

And a case almost identical in facts is *Ong Way Jong* v. *United States*, 245 F.2d 392 (9 Cir. 1957), also tried to the court without a jury. The Ninth Circuit, in reversing, stated that as to the defendant Ong, "There is a strong suspicion that he was dealing in narcotics. The agents followed Wee during all of the negotiations relating to the sale of February 1. They saw Wee meet no one but Ong

when Wee brought the narcotics back for sale. They saw Wee go to meet Ong immediately after he got the money for the sale. In each instance during the negotiations of the sale of February 1, when Wee said he was going to meet his 'connection', he met Ong. All this sounds quite convincing, and undoubtedly the agents themselves were convinced and convinced the learned trial judge that Ong was guilty." (245 F.2d 396).

Suspicion there may have been in this case, as in those above cited. But Sec. 174 of Title 21 U.S. Code permits certain presumptions *only* when the fact of possession is shown. One may not pile inference upon inference to obtain a presumption. "Congress has created a presumption upon proof of the existence of a fact, and now the government would have the court presume the fact." *United States* v. *Landry*, 257 F.2d 425 at 432 (7 Cir. 1958).

Certiorari should be granted to resolve the conflicts amongst the circuits as to the quantum of evidence necessary to be shown to prove the fact of possession before the presumption of knowledge of illegal importation permitted by 21 U.S.C. 174 may become operative.

3.

It was improper for the trial court to consider hearsay testimony in determining the issue.

Defendant objected to the hearsay declarations and statements made by French to Gallagher. (A. 3). The court ruled no conspiracy was shown, as it found defendant not guilty of Count 1, charging a sale of narcotics to Gallagher by French and defendant. (A. 1). During the course of the trial, the court reversed ruling on defendant's objections to statements made outside his pres-

ence. (A. 3). However, at the conclusion of the case, the court ruled that a necessary connection was shown between French and the defendant, ". . . but, I will tell you for what it is worth. I don't think the weight of that evidence is very great." (A. 26).

However, as in *Ong Way Jong* v. *United States,* 245 F.2d 392 (9 Cir. 1957), before the declarations of French could be admitted against the defendant, he must be bound in a conspiracy by acts and statements of his own. And even though the trial court did not credit the statements of French to Gallagher with very great weight, (A. 26) still when the judge gave it *any* weight, the defendant was prejudiced. As in *Ong,* p. 96:

> "It is then argued that, since the trial judge had the responsibility of deciding on the facts, he must be deemed to have excluded incompetent evidence. But this rule is of no avail in the event a motion for acquittal is made at the close of the case for the prosecution. At such a point the incompetence and sufficiency of the evidence is raised as a matter of law. We hold no sufficient evidence was presented by the government to hold the defendant or to place him on his defense." (245 F.2d 396-7).

To similar effect, see *Cass* v. *United States,* 361 F.2d 409 (9 Cir. 1966), where the court stated, p. 410:

> "But one cannot make of himself an authorized spokesman for another merely by extra-judicially saying that he is such. That would be the impossible feat of levitation by boot straps. What we have then, is the witness Salmi, [here read Gallagher], testifying that Esposito [read French] told him that Cass [read Mendell] had told Esposito that Cass had marijuana which he was willing to sell. As far as concerns use against Cass, the testimony was inadmissible hearsay."

However, the Seventh Circuit disagreed with the holding in *Cass* (See Op., App. A, p. 5).

Certiorari should be granted to resolve the conflicts between the Seventh and Ninth Circuits on this point.

The Court of Appeals held the hearsay statements to be admissible under some theory of "joint venture" between the defendant and French. We imagine the "joint venture" theory is akin to the conspiracy cases wherein the relaxation of the rules of evidence is the subject of the grant by this court of Certiorari in *Bostic* v. *United States,* No. 5250 O.T. 1970. One issue in *Bostic* upon which certiorari was granted is:

> "Does the conspiracy exception to the hearsay rule as heretofore applied in federal courts violate the Sixth Amendment's Confrontation Clause as interpreted in *Douglas* v. *Alabama,* 380 U.S. 415 (1965), and *Bruton* v. *United States,* 391 U.S. 123, 3 Cr. L. 3085 (1968)?"

Although the Court of Appeals pointed out that the trial judge did not deem the weight of the hearsay evidence to be very great, nonetheless, it was considered by the court in the judgment determining process.

Conclusion

For the reasons urged herein, we respectfully pray the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Attorney for Petitioner

APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1970 — APRIL SESSION, 1971

No. 18535

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN A. MENDELL,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JUNE 29, 1971)

Before SWYGERT, *Chief Judge,* CUMMINGS, and STEVENS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* After a bench trial, defendant was found guilty on Count 2 of an indictment charging various narcotics offenses and was sentenced to five years in prison.[1] Count 2 charged that defendant and

[1] Defendant was acquitted on Counts 1, 3 and 4; Counts 5 and 6 had been dismissed by the Government at the opening of the trial.

Robert French unlawfully received 15.301 grams of imported heroin in violation of 21 U.S.C. § 174.[2]

I

Defendant first objects that the district court should have granted his motion in arrest of judgment at the close of the Government's case because venue was not proven. Relying up *United States* v. *Jones,* 174 F.2d 746 (7th Cir. 1949), defendant argues that the lack of any explicit reference to Chicago, Illinois, as the location of the transactions rendered the evidence insufficient.

Venue need not be shown by direct evidence, but may be proven by the evidence as a whole or by circumstantial evidence. Venue is established where the testimony justifies the reasonable inference that the violation occurred at the place alleged in the indictment. *United States* v. *Budge,* 359 F.2d 732, 734 (7th Cir. 1966); *United States* v. *Chiarelli,* 192 F.2d 528, 532 (7th Cir. 1951), certiorari denied, 342 U.S. 913; *United States* v. *Karavias,* 170 F.2d 968 (7th Cir. 1948).

We agree with the district court that the testimony of the Government's witnesses sufficiently proved venue notwithstanding the omission of any specific indication of the city in which the events took place. The record is replete with testimony identifying streets, intersections, major thoroughfares, business establishments, and parks.[3] Both in volume and distinctiveness, this evidence was

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[2] French was not a defendant at the bench trial because he had previously pleaded guilty and received five-year concurrent sentences on the six counts of the indictment.

[3] Although the Government seeks to rely on three exhibits to show that the heroin here had been purchased in Chicago, these exhibits were never received in evidence. Therefore, defendant's motion to strike the reference thereto at p. 14 and in the Appendix of the Government's brief is granted.

tantamount to a testimonial declaration that the acts took place in Chicago. *United States* v. *Budge,* 349 F.2d 732, 734 (7th Cir. 1966); *Walker* v. *United States,* 397 F.2d 789 (5th Cir. 1968), certiorari denied, 394 U.S. 962; *Weaver* v. *United States,* 298 F.2d 496, 498 (5th Cir. 1962); *Dean* v. *United States,* 246 F.2d 335, 337 (8th Cir. 1957); *United States* v. *Lukenbill,* 421 F.2d 849 (9th Cir. 1970).

Nor does the opinion of this Court in *United States* v. *Jones,* 174 F.2d 746 (7th Cir. 1949), require a different result. The Court there observed that "venue will not be inferred from proof that the acts constituting the crime were committed upon certain streets, where the city within which the streets are located is not identified. The court will not take judicial notice that the streets referred to in the evidence are in any certain town." 174 F.2d at p. 749. Defendant suggests that this language forbids any judicial notice whatsoever of the geographic location of particular streets as proof of venue. We decline to give such sweeping import to these remarks.

Judicial notice may be taken of matters which are either so commonly known within the community as to be indisputable among reasonable men, or which are capable of certain verification through recourse to reliable authority. See *McCormick on Evidence,* §§ 324-325 (1954); Rule 201(b), Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates (March 1971) (51 FRD 315, 331). Among the matters long recognized as proper subjects for notice are a wide range of geographic facts, including location. The determination of geographic location of a street or other landmark mentioned in testimony involves two steps. First, judicial notice may be taken that the city, county, or other geo-

graphical area contains a street of that name. The second step involves the inference that the street mentioned is actually that located within the specified boundaries. The reasonableness of the inference as to geographic location from circumstantial evidence such as streets, landmarks, and the like, is a matter of degree. Each case must be judged on its own facts.

Where streets or other landmarks are few in number or commonly named, doubt as to their exact location remains, and the court may be compelled to withhold notice of that fact. Thus in *Jones,* this Court refused to place the "several" streets mentioned in testimony within the City of Chicago. That holding should not, however, be extrapolated into blanket prohibition of judicial notice that streets are in a certain city. Where, as here, the landmarks are sufficiently numerous and notorious, the inference that they are located within a particular municipality within the jurisdiction of the court may be properly made. Here the circumstantial evidence was sufficiently extensive and characteristic of Chicago to warrant the inference that the criminal acts occurred in the Northern District of Illinois.

II

Defendant contends that the district judge improperly admitted hearsay statements made by co-defendant French to narcotics agent John J. Gallagher, relating communications between defendant and French. In receiving this evidence, the district judge concluded that a "connection" had been shown between defendant and French, so that the statements were receivable under the joint venture exception to the hearsay rule. See *United States* v. *Jones,* 438 F.2d 461, 466 (7th Cir. 1971). Defendant urges that

French's revelations to Gallagher cannot be used to show the joint venture because that would involve "the impossible feat of levitation by boot straps." *Cass* v. *United States*, 361 F.2d 409, 410 (9th Cir. 1966). We disagree.

As in the recent *Jones* case, there was ample independent evidence that defendant and French were engaged in a joint venture in the sale of heroin. Agents Gallagher and Rankin testified to their observation of defendant's and French's suspicious activities together on two nighttime occasions on August 7. Agent Nolan also testified to overhearing an extremely damaging conversation between them in a hotdog stand about 11:00 p.m. that same evening. These conversations harmonized with subsequent actions of French and defendant that were observed still later that night. Consequently, apart from any statements of French to Gallagher, the Government sufficiently showed a joint venture between defendant and French, so that the district court was entitled to consider French's narration to Gallagher of conversations between French and the defendant.[4]

III

Defendant's final point is that the evidence did not show that he possessed the 15 grams of heroin in question. It is well settled that circumstantial evidence is sufficient to support convictions of narcotics offenses. *United States* v. *Spencer*, 415 F.2d 1301, 1303 (7th Cir. 1969); *United States* v. *Lawler*, 413 F.2d 622 (7th Cir. 1969). We conclude that the trier of facts was justified in inferring that the two packages passed by defendant to French contained this heroin, as shown by the following testimonial highlights:

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[4] It is noteworthy that the trier of facts did not deem the weight of that evidence to be "very great." As he concluded, "I don't think leaving it out would destroy the case in fact."

Agent Gallagher testified that he met co-defendant French about 7:15 p.m. on August 7 at 4015 West North Avenue. French told Gallagher "the people" were waiting around the corner with a sample of heroin. Gallagher told French to obtain it. French was then observed walking in the vicinity with defendant, who reached inside his sport shirt and withdrew something which he handed to French. In a quarter of an hour or so, French returned and handed Gallagher a small plastic wrapped container containing 2.625 grams of a heroin hydrochloride mixture. Gallagher paid French $100 for the sample. French told Gallagher "the people" were waiting for the $100 and that he would immediately go and order "the ounce" requested by Gallagher.

Soon afterwards, French and defendant were again seen conversing nearby. French then rejoined Gallagher in his car and told him "the people" wouldn't get the ounce of heroin for Gallagher without $300. After Gallagher made a telephone call (apparently to receive authorization to pay this sum), French told him to drive to the vicinity of LeMoyne Street and Pulaski Road, where Gallagher handed French the $300. French walked to the corner of LeMoyne and Keystone Avenue where he gave defendant a quantity of money. He then returned to Gallagher's car and informed him they should have the heroin within an hour, and that "Johnny" had gone to pick it up. French added that "Johnny" was reliable and would be able to supply Gallagher with anywhere up to 20-30 ounces of heroin at a time, but that "Johnny" wanted one-third of the money before delivery. French said he had done business with him in the past.

Gallagher and French remained together until 10:15 p.m. Fifteen minutes later, Gallagher observed French conversing with defendant at LeMoyne and Pulaski. Defendant handed something to French who placed it in his right pants pocket. Immediately thereafter French rejoined Gallagher at his car. French reached in the same pocket for a piece of newspaper containing a plastic-wrapped package containing 12.515 grams of a heroin hydrochloride mixture. He handed this to Gallagher, who paid him an additional $600 for it.

At 11:00 p.m., agent Nolan overheard French and defendant conversing in a hotdog stand at the corner of Pulaski and Grand Avenue. French asked defendant why it took so long to get the "stuff," and defendant replied that he had to go to Blue Island for it. Defendant remarked that he did not want to be paid in big bills because they aroused suspicion. French agreed that all future deals would be in smaller denominations. Defendant said "fine" and then indicated that he would be able to supply all French needed "from here on." After this transaction was completed, additional testimony was adduced linking French and defendant as to Gallagher's claim that the second package was light and as to his request for additional heroin.

In our view, this evidence sufficed to support the district judge's finding that defendant twice supplied French with the heroin he in turn transferred to agent Gallagher. Cf. *United States* v. *Dichiarinte,* 385 F.2d 333, 340 (7th Cir. 1967), certiorari denied *sub nom. Mastro* v. *United States,* 390 U.S. 944.

Affirmed.

STEVENS, *Circuit Judge,* concurring. In my opinion, *United States* v. *Jones,* 174 F.2d 746 (7th Cir. 1949), is not distinguishable and should be expressly overruled.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Monday, August 30, 1971

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 18535 vs.

JOHN A. MENDELL,

Defendant-Appellant.

IT IS ORDERED by the Court that the petition for rehearing filed in this appeal be and the same is hereby denied.